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DEC 14 2015

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 15-22784-B-13
)
JOSEPH CHARLES ADKINS and) DC No. DBJ-3
HEATHER ANN ADKINS,)
)
)
)
Debtor(s).)
)

**MEMORANDUM DECISION DENYING TRI COUNTIES BANK'S MOTION FOR
RECONSIDERATION**

Introduction

15 Secured creditor Tri Counties Bank moves for reconsideration
16 of the court's earlier order valuing its collateral and
17 bifurcating its secured claim under a second deed of trust into
18 secured and unsecured claims. The court bifurcated Tri Counties'
19 secured claim because, in addition to a lien on the principal
20 residence of debtors Joseph Charles Adkins and Heather Ann Adkins
21 located at 1940 Morning Star Way, Shasta Lake, California, 96019,
22 Tri Counties' second deed of trust granted a security interest in
23 personal property not affixed to the residence. Because of that
24 security interest, the court concluded that Tri Counties' secured
25 claim was not protected by the anti-modification provision of 11
26 U.S.C. § 1322(b)(2) which prohibits modification of a claim
27 secured only by a debtor's principal residence. The court now
28 reaffirms that ruling.

1 Background

2 On or about April 5, 2007, Mr. Adkins executed a second deed
3 of trust in favor of North Valley Bank.¹ That second deed of
4 trust secures a promissory note in the original principal amount
5 of \$25,000.00. It creates a lien on the debtors' residence. And
6 it grants a security interest in personal property that is not
7 affixed to the debtors' residence.

8 The debtors filed a chapter 13 petition on April 6, 2015.
9 On June 18, 2015, the debtors moved to value their residence at
10 \$75,000.00, subject to a first deed of trust in the amount of
11 \$81,256.23. According to the debtors, that rendered the Tri
12 Counties' second deed of trust with a balance of \$25,917.50
13 wholly unsecured and left Tri Counties with a secured claim
14 valued at \$0.00.

15 Tri Counties objected to the debtors' valuation and
16 submitted an appraisal which valued the debtors' residence at
17 \$85,000.00. The court held a hearing on the debtors' valuation
18 motion on August 12, 2015. The court accepted Tri Counties'
19 appraisal and valued the debtors' residence at \$85,000.00 in an
20 order entered on August 17, 2015.

21 Based on the \$85,000.00 valuation, the court bifurcated Tri
22 Counties' claim into a secured claim of \$3,743.77 (\$85,000.00
23 valuation - \$81,256.23 1st deed of trust) and a general unsecured
24 claim for the balance. The court bifurcated Tri Counties'

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¹No party disputes that Tri Counties is now the beneficiary
27 under that second deed of trust.

1 secured claim because it concluded that Tri Counties' second deed
2 of trust created a lien on "Real Property" which consisted of the
3 debtors' residence and also granted a security interest in
4 "Personal Property" which, in addition to fixtures, included
5 equipment and other articles of personal property not affixed to
6 the debtors' residence.²

7

8 **Jurisdiction and Venue**

9 Federal subject-matter jurisdiction is founded on 28 U.S.C.
10 § 1334. This matter is a core proceeding that a bankruptcy judge
11 may hear and determine. 28 U.S.C. §§ 157(b)(2)(A), (B), and (O).
12 To the extent it may ever be determined to be a matter that a
13 bankruptcy judge may not hear and determine without consent, the
14 parties nevertheless consent to such determination by a
15 bankruptcy judge. 28 U.S.C. § 157(c)(2). Venue is proper under
16 28 U.S.C. § 1409.

17

18 **Discussion**

19 Reconsideration Under Federal Rule of Civil Procedure 60(b)(6)
20 Applicable by Federal Rule of Bankruptcy Procedure 9024 is
Appropriate.

21 Tri Counties requests reconsideration under Rule 60(b)(6),
22 which states:

23 (b) . . . On motion and just terms, the court may
24 relieve a party or its legal representative from a
final judgment, order, or proceeding for the following
reasons:
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26 ²Tri Counties' attorney initially concurred with this
27 assessment on the record in open court.

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2 (6) any other reason that justifies relief.

3 Fed. R. Civ. Pro. (60) (b) (6).³

4 Relief from judgment for "any other reason" under Rule
5 60(b)(6) is limited to exceptional or extraordinary
6 circumstances, and the moving party bears the burden of
7 establishing the existence of such circumstances. In re
8 Martinelli, 96 B.R. 1011, 1013 (9th Cir. BAP 1988) (citations
9 omitted). Motions for reconsideration which revisit the same
10 issues already ruled upon, or which advance supporting facts that
11 were available when the issues were originally briefed, will
12 generally not be granted. Alexander v. Bleau (In re Negrete),
13 183 B.R. 195, 197 (9th Cir. BAP 1995) (citation omitted)).

14 The court *sua sponte* raised the applicability of
15 § 1322(b)(2) to Tri Counties' secured claim under its second deed
16 of trust during the hearing on the debtors' valuation motion. In
17 doing so, the parties did not have an opportunity to address §
18 1322(b)(2) or bifurcation of Tri Counties' secured claim prior to
19 that hearing. Therefore, Tri Counties' motion under Rule
20 60(b)(6) is appropriately brought.

21
22 Tri Counties' Claim is Not Protected by the Anti-Modification
23 Provision of § 1322(b)(2) Which Means Its Secured Claim May be
Modified and Bifurcated Into Secured and Unsecured Claims.

24 The issue on reconsideration is whether Tri Counties'

25 _____
26 ³Federal Rule of Civil Procedure 60(b) is made applicable to
27 bankruptcy cases through Federal Rule of Bankruptcy Procedure
9024.

1 secured claim under its second deed of trust is protected by the
 2 anti-modification provision of § 1322(b)(2). Section 1322(b)(2)
 3 states that a "plan may-

4 (2) modify the rights of holders of secured claims,
 5 other than a claim secured only by a security interest
 6 in real property that is the debtor's principal
 7 residence, or of holders of unsecured claims, or leave
 8 unaffected the rights of holders of any class of
 9 claims[.]"

10 11 U.S.C. § 1322(b)(2).

11 Tri Counties relies primarily on In re Lee, 215 B.R. 22 (9th
 12 Cir. BAP 1997).⁴ Tri Counties argues that its secured claim is
 13 protected by § 1322(b)(2) for two reasons: (1) the personal
 14 property encumbered by its second deed of trust is limited to
 15 fixtures which are part of the debtors' residence; and (2) even
 16 if the encumbered personal property is not limited to fixtures,
 17 the second deed of trust only encumbers personal property that is
 18 incidental to the debtors' residence and is of little or no
 19 value. Neither argument is persuasive.

20 Although several factors are considered in determining if
 21 personal property is a fixture, at a minimum, to be a fixture
 22 personal property must be affixed to real property. See Knell v.
Morris, 247 P.2d 352, 355 (Cal. 1952). Tri Counties points out
 23 that the sub-paragraph entitled **Security Agreement** under the
 24 paragraph on page 4 of the second deed of trust entitled **SECURITY**

25 ⁴Lee was decided under § 1123(b)(5) which is the chapter 11
 26 counterpart to § 1322(b)(2). Cases interpreting one provision
 27 are applicable to interpretations of the other. See Wages v.
J.P. Morgan Chase (In re Wages), 508 B.R. 161, 164 (9th Cir. BAP
 2014); Benafel v. Onewest Bank, FSB (In re Benafel), 461 B.R.
 581, 586-87 (9th Cir BAP 2011); see also Lee, 215 B.R. at 24.

1 **AGREEMENT; FINANCING STATEMENTS** states that the second deed of
2 trust is "a Security Agreement to the extent any of the Property
3 constitutes fixtures." However, Tri Counties ignores the next
4 sub-paragraph entitled **Security Interest** which grants a security
5 interest in two very different types of Personal Property: (1)
6 that which is affixed and the debtors are prohibited from
7 removing, severing, or detaching; and (2) that which is "not
8 affixed" which the debtors are, upon default, required to gather
9 together and assemble at a mutually convenient location and make
10 available to Tri Counties within three days of a written demand.⁵

11 The term Personal Property is defined on Page 8 of the
12 second deed of trust to include, in addition to fixtures, "all
13 equipment, ... and other articles of personal property now or
14 hereafter owned by [the debtors[.]]" When this definition is
15 read in conjunction with the paragraph that grants a security
16 interest in Personal Property that is "not affixed" to the
17 debtors' residence - and that has to be gathered and is capable
18 of being brought to and assembled at a location other than the
19 debtors' residence - the court is persuaded that the security
20 interest in Personal Property granted under Tri Counties' second
21 deed of trust is not limited solely to fixtures. In other words,

⁵The sub-paragraph states as follows:
Upon default, trustor shall not remove, sever or detach the Personal Property from the Property. Upon default, Trustor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Trustor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

1 the definition of Personal Property in Tri Counties' second deed
2 of trust captures equipment and other items of personal property
3 that are not affixed to the debtors' residence and, in fact,
4 exist apart from and are independent of the residence. Such
5 items of personal property are not, and cannot be, fixtures.
6 Moreover, the inclusion of such items in the definition of
7 Personal Property and the grant of a security interest in those
8 items reflects an intent that the second deed of trust also reach
9 and encumber personal property that is not necessarily incidental
10 to the debtors' residence and not of inconsequential value or
11 worthless.

12 The applicability of § 1322(b)(2) is determined as of the
13 petition date. Wages, 508 B.R. at 164; Benafel, 461 B.R. at 591.
14 Additionally, and importantly here, a security agreement may be
15 created by the integration of several documents which means a
16 description of a collateral may exist in documents other than a
17 security instrument itself. See, e.g., Nolden v. Plant
18 Reclamation (In re Amex-Protein Dev. Corp.), 504 F.2d 1056, 1060
19 (9th Cir. 1974) ("there is no requirement that the description of
20 collateral be complete within the four corners of the security
21 agreement or other single document"). That is what exists here.

22 General descriptions of collateral are typically
23 insufficient to create a security interest. See Cal. Comm. Code
24 § 9108(c). However, Schedule B filed with the petition
25 identifies numerous items of personal property the debtors owned
26 on the petition date. A substantial number of those items have
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1 nothing to do with the debtors' residence, and many could not
2 even be affixed to the residence. Yet, all fit neatly within the
3 definition of "articles of personal property now ... owned" that
4 are "not affixed" to the debtors' residence. And in that
5 context, all fall squarely within the definition of Personal
6 Property encumbered by Tri Counties' second deed of trust.

7 The items of personal property identified in Schedule B are
8 also not of insignificant value or worthless. Whereas Lee
9 involved a loan of over \$1,000,000.00 which rendered the
10 additional personal property collateral in that case of little or
11 no value, the \$52,320.07 value of personal property identified in
12 Schedule B and encumbered by the security interest granted in Tri
13 Counties' second deed of trust is twice the amount of the unpaid
14 loan balance. Those items are also claimed as exempt in Schedule
15 C.

16 Further, in Lee there was a clear expression of the parties'
17 intent in the deed of trust itself that personal property
18 incidental to the debtor's residence such as the oven, range,
19 washer, dryer, dishwasher, and refrigerator all were to be
20 considered part of the residence. Indeed, the deed of trust in
21 Lee expressly stated that all such items were conclusively deemed
22 to be affixed to the real property. Here, in contrast, the items
23 of personal property encumbered by the security interest granted
24 under Tri Counties' second deed of trust are not limited to items
25 that could be considered incidental to the debtors' residence.
26 Indeed, many of the items listed on Schedule B have no

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1 relationship to the residence. More importantly, Tri Counties
2 points to no provision in its second deed of trust that states
3 any or all of the items of Personal Property encumbered by a
4 security interest are conclusively deemed to be affixed to the
5 debtors' residence. In fact, inasmuch as the second deed of
6 trust encumbers unrelated items of personal property that are
7 "not affixed," it says the opposite.

8 In sum, Lee is factually distinct from this case and
9 provides no support for Tri Counties' position on
10 reconsideration. In addition to personal property that is
11 affixed to the debtors' residence, i.e., fixtures, Tri Counties'
12 second deed of trust also grants a security interest in
13 identifiable personal property that is not affixed to the
14 debtors' residence, that is not incidental to the debtors'
15 residence, and that in relation to the loan balance owing on the
16 promissory note secured by the second deed of trust is not of
17 inconsequential value or worthless.

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19 **Conclusion**

20 Based on the foregoing, the court reaffirms its prior ruling
21 that Tri Counties is not secured only by the debtors' principal
22 residence, it is not protected by the anti-modification provision
23 of § 1322(b)(2), and its secured claim under its second deed of
24 trust may be modified and bifurcated. Therefore, as previously
25 stated in the Civil Minutes filed on August 12, 2015, and the
26 Civil Minute Order entered on August 17, 2015, Tri Counties shall

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1 have a secured claim on its second deed of trust in the amount of
2 \$3,743.77 as the amount of equity over and above the balance
3 owing on the first deed of trust. The remainder owing under the
4 second deed of trust is a general unsecured claim.

5 A separate order denying Tri Counties' motion for
6 reconsideration will issue.

7 Dated: December 14, 2015.

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9 UNITED STATES BANKRUPTCY JUDGE
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1 **INSTRUCTIONS TO CLERK OF COURT**
2 **SERVICE LIST**

3 The Clerk of Court is instructed to send the attached
4 document, via the BNC, to the following parties:

5 Bonnie Baker
6 2400 Washington Avenue, Suite 210
7 P O Box 991471
8 Redding CA 96001

9 Douglas B. Jacobs
10 20 Independence Cir
11 Chico CA 95973

12 Jan P. Johnson
13 PO Box 1708
14 Sacramento CA 95812